
Final Report on Remand Regarding the Impact of the 2002 City of Homer Annexation on the Kachemak Emergency Service Area

September 23, 2004



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Department of Commerce, Community,
& Economic Development

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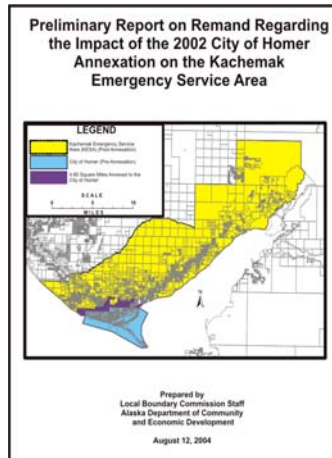
This report is also available on the Local Boundary Commission Website at:
http://www.commerce.state.ak.us/dca/lbc/final_homer_annex_remand.htm

TABLE OF CONTENTS

Introduction	1
Part I – Update of Procedural Activities	1
Part II – Summary of Comments.....	3
Part III – Consideration of Comments	13
Part IV - Effect of Annexation on KESA	18
Part V – Final Recommendations	30
Appendix A May 18, 2004, Order of the Local Boundary Commission Relating to Procedures for Consideration of the Amended City of Homer Annexation Petition Upon Remand	
Appendix B Make your Comments to the LBC Count!	
Appendix C Laws Governing Decisional Procedures 3 AAC 110.570	
Appendix D Kenai Peninsula Borough Ordinance No. 2001-48	
Appendix E Report to the Kenai Peninsula Borough Assembly, May 25, 2000 From Mayor Dale Bagley	

INTRODUCTION

This *Final Report on Remand Regarding the Impact of the 2002 City of Homer Annexation on the Kachemak Emergency Service Area* (KESA) is issued by the Department of Commerce, Community, and Economic Development (hereinafter, "the Department")¹ in accordance with the directives and timeline set out in the May 18, 2004, order of the Local Boundary Commission (Commission or LBC).² This *Final Report on Remand* was



developed after due consideration of the timely comments filed in response to the Department's August 12, 2004, *Preliminary Report on Remand Regarding the Impact of the 2002 City of Homer Annexation on the Kachemak Emergency Service Area*.

In addition, this document recounts procedural activities that have occurred since issuance of the *Preliminary Report on Remand*. It also conveys the Department's final recommendations to the Commission concerning the impact on KESA of the March 20, 2002, annexation of 4.58 square miles of territory by the City of Homer (City).

PART I – UPDATE OF PROCEDURAL ACTIVITIES

A. Distribution of Preliminary Report on Remand

On August 12, 2004, the Department distributed copies of its 204–page *Preliminary Report on Remand* to 35 interested individuals and parties including each participating member of the Commission;³ the City of Homer; each of the 14 respondents; the former Commission members serving at the time annexation was approved in 2002; and the respective legal counsel for: the Commission; the City; Alaskan's [sic] Opposed to Annexation, *et al.*; Kachemak Area Coalition, Inc.; and Abigail Fuller. The Homer City Clerk and the Homer Library were each provided 15 copies of the *Preliminary Report on Remand* for use by the public. On August 12, 2004, the Department also posted the report on the Internet at http://www.Commerce.state.ak.us/dca/lbc/homer_annex_remand.htm.

¹The Department was formerly known as the Department of Community and Economic Development (DCED). The change in name took effect on September 2, 2004.

²A copy of that order is included with this report as Appendix A and is hereinafter referred to as the *Commission's Remand Order of May 18*.

³Commissioner Bob Hicks has been recused from participating in this proceeding.

B. Timely Comments on Preliminary Report on Remand

The *Commission's Remand Order of May 18* established September 2, 2004, as the deadline for submitting written comment on the *Preliminary Report on Remand*. Ten sets of comments were filed by that established deadline.⁴ Those comments are posted on the Commission's Web site identified above. A copy of the comments has been provided to each member of the Commission.

The timely comments on the *Preliminary Report on Remand* are summarized below in Part II.

C. Commission Meeting and Hearing

At its public meeting on September 1, 2004, the Commission determined that it will conduct a public hearing on this matter in Homer on November 20, 2004. Public notice of the time and place for the hearing will be issued in the near future. Guidelines for comments at the hearing ("Make Your Comments to the LBC Count!") are provided at this time in Appendix B.

The hearing will be conducted in accordance with procedures established by the *Commission's Remand Order of May 18*.⁵ As discussed in the order, following the hearing, the LBC may convene a decisional session regarding the annexation issue on remand in accordance with State law (3 AAC 110.570). A copy of the laws governing decisional sessions is included in this Final Report as Appendix C.

Copies of the documents included in this report as Appendices B-C will also be provided to the City of Homer Public Library and the office of the Homer City Clerk for review by the public.

D. Respondent Coordination

As discussed in the reports issued in the initial phase of this proceeding,⁶ it is atypical to have multiple respondents in a Commission proceeding. With due deference to the right of each of the fourteen Respondents to act individually during the hearing, Respondents are strongly encouraged to coordinate prior to the hearing to avoid repetitive statements and testimony.

⁴Identical comments were submitted by Dr. Vi Jerrell, once on her own behalf and once on behalf of respondent, Alaskan's [sic] Opposed to Annexation, *et al.* Those duplicative comments are summarized only once but are counted as two of the ten sets of comments.

⁵The hearing procedures are set out on pp. 9 - 12 of that Order.

⁶See the Department's *Preliminary Report Regarding the City of Homer's Proposal for Annexation of an Estimated 25.64 Square Miles*, October 2001, p. 29, and *Final Report Regarding the City of Homer's Proposal for Annexation of an Estimated 25.64 Square Miles*, November 2001, p. 4.

PART II – SUMMARY OF COMMENTS

SUMMARY OF COMMENTS CONCERNING THE DEPARTMENT'S <i>PRELIMINARY REPORT ON REMAND</i>	
Alaskans Opposed to Annexation and Dr. Vi Jerrell (AOA/Jerrell)	
Two sets of identical comments, each submitted as a four-page letter with one attachment	<p>In their letters filed September 2, 2004, AOA/Jerrell:</p> <ul style="list-style-type: none"> • Objected to the information submitted by the City that relates to events occurring after the January 17, 2002, time limit established by the Commission. • Contended that the City and its Manager have misrepresented facts, figures, and maps of the areas. • Asserted that KESA was legally formed and will remain exactly as formed by the Kenai Peninsula Borough (KPB or Borough). • Asserted that LBC needs to address effect of the City's annexation of 4.58 square miles on KESA. • Asserted that the City has been unable to provide services, such as water and sewer, to about 50 percent of the people within the corporate boundaries of the City and cannot provide any services for others or annexed areas. • Referred to news articles re the City's dumping raw sewage into Kachemak Bay and ocean. • Contended that the City's original petition sought to annex noncontiguous areas in violation of LBC annexation standards. • Requested that all annexation be vacated. • Emphasized that they are Americans and insist that their Alaska and U.S. constitutional rights be protected.
Attachment	A copy of the LBC's May 21, 2004, <i>Notice of Opportunity to Comment regarding KESA and Homer Annexation Remand</i> with hand-written note referencing time constraints on evidence and comments.

Alaskans Opposed to Annexation and Doris Cabana (AOA/Cabana)⁷		
Three-page letter with two attachments	In comments filed September 2, 2004, AOA/Cabana:	<ul style="list-style-type: none"> • Resubmitted AOA's June 24, 2004, comments responding to the LBC's May 21, 2004, <i>Notice of Opportunity to Comment Regarding KESA and Homer Annexation Remand</i>. • Noted that the hiring date of the current City Manager was post-annexation. • Alleged that the former City Manager acted inappropriately regarding the annexation. • Described as arrogant the City's and LBC's arguments on appeal regarding impact of annexation on KESA. • Asserted that KESA was created and will continue to exist even if the City annexes any part of it. • Contended that the City has a poor attitude toward KESA and annexation. • Stressed that the people opposing annexation were not allowed to vote on the issue. • Protested comments submitted by the City that related to events occurring after January 17, 2002. • Opined that Judge Rinder should be informed of the City's noncompliance with the Commission's order. • Opposed any annexation to the City.
Attachments		<ol style="list-style-type: none"> 1. Copy of AOA's previously submitted comments re annexation remand (three pages). 2. Copy of first page of City's June 24, 2004, comments re annexation remand with a note to Judge Rinder pointing out City's submitting evidence as an offer of proof and AOA's protest thereof (one page).

⁷Submitted by cover letter from Doris Cabana and AOA.

Doris Cabana and AOA (Cabana/AOA)⁸	
Three-page letter, with two attachments	<p>In comments filed September 2, 2004, Cabana/AOA:</p> <ul style="list-style-type: none"> • Resubmitted her June 24, 2004, comments responding to the LBC's May 21, 2004, <i>Notice of Opportunity to Comment Regarding KESA and Homer Annexation Remand</i>. • Described the City's annexing of noncontiguous territory, in violation of annexation standards. • Asserted that the entire annexation should be thrown out. • Contended that the motive for the City's annexation was grant and tax money. • Contended that there have been few benefits for the residents at either end of the City. • Asserted that the annexed area was cherry-picked by the City. • Asserted that the taxpayers outside the City were treated poorly by both the City and the LBC. • Protested evidence submitted by the City that related to events occurring after January 17, 2002.
Attachments	<ol style="list-style-type: none"> 1. Copy of Ms. Cabana's previously submitted comments re annexation remand (two pages) with a two-page attachment from KPB re ordinance creating KESA. 2. Copy of a news article with a hand-written note stating it was from the October 6, 2001, <i>Anchorage Daily News</i>, pp. B1-2, relating to the Department's recommendation to approve annexation of only 3 square miles of territory by the City (2 pages).

⁸Submitted by cover letter from Doris Cabana and AOA.

Citizens Concerned About Annexation (CCAA)	
Two filings:	
One page letter with an attachment, listed as KPB Emergency Service Numbers, and two large maps	<p>In its letter filed August 26, 2004, CCAA:</p> <ul style="list-style-type: none"> • Stated that the two maps it enclosed <ul style="list-style-type: none"> i) were of the KPB and illustrated the outlying areas around KESA; ii) reflect there is little or no taxable area that had not been included in KESA or other service areas; iii) reflect that KESA is surrounded by areas either with their own fire and emergency area or rural emergency area, all with no taxable property. • Hoped the maps cleared up any misunderstanding.
Two pages of electronic mail messages: one message stating CCAA's comments were attached and the others were between Abigail Fuller/CCAA and the KPB; 11 pages of comments, with a one-page attachment	<p>In its filing submitted September 1, 2004, CCAA:</p> <ul style="list-style-type: none"> • Included electronic correspondence with the KPB discussing the assessment and value of property in re KESA, annexed area, and Millers Landing. • Alleged that the Department did not adequately address the issue before the LBC. • Stated that the Department cited the incorrect set of regulations. • Asserted that the Department's claim that cities are preferred over service areas is irrelevant to the issue before the LBC and that creation of KESA is not at issue. • Asserted that the Department's analysis of the Court's authority and issue on remand has no merit. • Asserted that the Court did not create a new standard, it was merely ensuring that the LBC comply with its constitutional and statutory duties. • Opined that the Department had not provided any guidance to the LBC on the issues on remand and that CCAA would fill that void. • Maintained that the loss of tax revenue to KESA will result in a reduced budget, reduced services, fewer equipment purchases, fewer volunteers trained, and fewer stations built, all of which equate to slower response time and loss of life and property. • Asserted that the reduced budget hurts KESA's ability to provide improved services.

CCAA (continued)	
	<ul style="list-style-type: none">• Claimed that the Department threw many numbers around but never produced a figure as to how much money was taken away from KESA.• Maintained that the Department's comparing KESA to other service areas is inapposite because each service area is unique.• Determined that the annual loss of revenue to KESA is \$114,593.• Enumerated what \$114,593 annually could fund and what is needed to bring area response times up to industry standard.• Questioned what the City plans for improving services to make-up for KESA's loss.• Defined the State's interest as the efficient and cost-effective provision of necessary services.• Theorized that the State does not care whether service is provided by a borough or a city and that it only cares whether the needs of the people are being met in an efficient cost-effective manner.• Claimed that KESA or KPB can do a much better job of meeting the needs of residents if it does not lose 25 percent of the tax base to the City.• Asserted that the City cannot improve services to the territory beyond that annexed.• Asserted that when comparing the benefit to the 900 people being annexed to the detriment of the 4000 people who remain in KESA, annexation is not in the State's best interest.
Attachment	Table of population, area, and tax assessed values for KESA and annexed territory by the City.

Abigail Fuller	
<p>One page electronic mail message addressing format of her attached comments; seven pages of comments</p>	<p>In her filing of August 30, 2004, Ms. Fuller:</p> <ul style="list-style-type: none"> • Contended that the Department gave only lip service to the issues before the LBC on remand. • Stated that the Department cited the incorrect set of regulations and noted that the balanced best-interest standard was amended May 2002; i.e., after the annexation proceeding. • Asserted that the Department did not analyze the impact of annexation on KESA. • Maintained that the Department did not adequately address written comments. • Argued that the Department's conclusion regarding the adverse impact on and viability of KESA is insufficient. • Asserted that the Court did not direct the LBC to determine whether KESA was still viable after annexation; it was directed to consider the impact of annexation on KESA and reconsider whether such is in the State's best interest. • Repudiated the majority of the Department's report as being irrelevant to the issue on remand. • Asserted that the Department misinterprets the law regarding creation of service areas but, in any event, creation of a service area is not at issue. • Denigrated the objectivity of the Department's report and described it as a diatribe. • Confined the remainder of her analysis to the comments by Kevin Waring and the City submitted in this remand proceeding. • Refuted Mr. Waring's conclusion that the post-annexation population of Homer is much greater than that of KESA. • Refuted Mr. Waring's conclusion that the Alaska Constitution has a blanket preference for cities over service areas. • Asserted that the impact on KESA is not whether it can deliver services but how much service it can deliver. • Stated that all options for delivery of services involve changes to either the level of service or the tax burden, both of which affect the State's interest. • Claimed that the KPB did not concur with the City's transition plan but did express concerns about it and hoped that an agreement was reachable.

Abigail Fuller (continued)

- Noted the City's introduction of evidence relating to events that occurred after the LBC's cutoff date and expected the Commission to ignore that material.
- Asserted that the City did not use the correct tax assessment figures in its calculations of the impact of annexation on KESA.
- Maintained that the State's interest is the areawide or statewide effect of annexation and that the LBC was created to decide boundary issues rather than leave them up to municipalities.
- Claimed that the KPB did not openly oppose annexation because of politics and that KPB Mayor Bagley did oppose the annexation, although he filed no comments; as did KPB Assembly member Milli Martin.
- Noted that while KESA had no legal authority to oppose annexation on its own behalf, KESA board members Mary Griswold and Lee Krumm opposed it as individuals.
- Refuted the City's claim that the State's interest favors healthy cities.
- Asserted that the State's interest favors boroughs and that cities were allowed only to accommodate political realities.
- Maintained that while the State may have an interest in the financial soundness of cities, it also has an interest in a borough's ability to provide services, in this case through a financially strong service area.
- Addressed the City's concern that inclusion of the annexed area in KESA was unwise by stating that the only rational choice was to include all territory outside the City limits that could be served by an area fire department because neither KESA nor the KPB assembly could predict what would be annexed.
- Asserted that the City's argument that annexation better serves the needs of the people in the territory annexed is not the issue before the LBC; the issue is what is in the State's best interest.
- Discounted the City's claims that it is more efficient for it to service the areas near the city core and for KESA to focus on the rural area.
- Asserted that the loss of tax base from annexation reduces KESA's ability to enhance rural services.

Abigail Fuller (continued)

- Questioned how raising the mill rate for KESA as suggested by the City is in the State's best interest.
- Observed that KESA's efforts were aimed at improving services to all, including Homer, and that reducing its budget to serve only the rural areas and not make improvements that benefit both KESA and Homer is a loss to everyone and not in the State's best interest.
- Maintained that the converse of the LBC's considering the impact of annexation on KESA is the impact of KESA on the annexation proposal, not the impact on Homer of not annexing.
- Asserted that maintaining the status quo can never be described as an impact.
- Claimed that with the addition of Millers Landing to KESA, the effect of KESA on the City was to relieve it of the greatest part of the burden of which it complained; providing emergency services to the outlying area without compensation.
- Claimed that the need for water and sewer service in the annexed area was speculative and should be given no great weight in reconsidering the State's best interests, even though the Court accepted such as part of the LBC's decision.
- Stated that the City's suggestion that raising KESA's taxes to solve the budget shortfall is an avenue equally available to the City.
- Contended that the City's proposition of having the State increase spending for wildfire suppression if KESA is financially unable to do so is not in the best interest of the State because annexation is presumed to be in the State's interest when it reduces the burden on the State, not increasing it.
- Asserted that the City did not factor in the 1-mill road service area tax that is diverted from the KPB to the City and that the City exaggerates its financial position without the annexed area.
- Concluded that if, in fact, the City is hurt by the lack of annexation, it could shift responsibilities to the KPB.
- Asserted that the City's argument regarding its financial position makes it clear that annexation was for money and that that is not a valid reason for annexation.

City of Homer	
One-page fax cover sheet with a two-page letter attached	<p>In its letter filed September 1, 2004, the City:</p> <ul style="list-style-type: none"> • Generally concurred with the Department's review and analysis of the remand (Chapter 3) and agreed it was necessary for the LBC to discuss and decide the question posed by the Court. • Agreed that KESA remains a more than viable fire and emergency service area after annexation. • Observed that the Department did not comment on the deleterious effects that denial of annexation will have on the City. • Contended that the City has established that the negative impacts associated with the denial of annexation far outweigh the negative impact experienced by KESA as a result of annexation. • Maintained that it is in the best interest of the City and the State that the annexation be affirmed. • Claimed that the record clearly shows that the LBC adequately considered the potential impacts on KESA. • Asserted that the Department and the LBC have the knowledge, background, and expertise to make well-reasoned policy decisions regarding complex matters such as annexation; i.e., the process worked as the drafters of the constitution intended. • Concurred completely with the Department's conclusions and recommendations that the effect of annexation on KESA should be discussed by the LBC and that the annexation should be affirmed because it is in the best interests of the State.

John McLay	
One-page letter	<p>In his letter filed August 31, 2004, Mr. McLay:</p> <ul style="list-style-type: none"> • Asserted that the Department had not analyzed the impact of annexation on KESA as ordered by the Court. • Suggested that a remand final report be issued, a hearing be scheduled, and a decisional meeting held.

Allan Tesche	
Two-page letter	<p>In his letter filed August 27, 2004, Mr. Tesche:</p> <ul style="list-style-type: none"> • Stated that the Department performed its customary thorough, credible, and knowledgeable analysis of the issues. • Agreed with the Department that in its remand, the Court has, in effect, created and imposed a new city annexation standard. • Agreed with the Department that the Court's "new standard" conflicts with Alaska's Constitution and Statutes concerning the clear preference for city annexation over creation of a new borough service area. • Agreed with the Department that imposition of the Court's "new standard" is incompatible with prior Alaska Supreme Court rulings involving the Commission. • Noted that the LBC members who rendered the original Homer decision were well aware of the constitutional and statutory preference for city annexation over creating a new borough service area (noted also that the LBC had dealt with that issue in the three prior cases outlined in the preliminary report). • Characterized the written comments submitted in this remand proceeding by Kevin Waring, (Chair of the Commission at the time of the original Homer decision) as eloquently and accurately reflecting LBC thinking when it rendered the original Homer decision. • Noted that the comments by Kevin Waring also offer relevant concerns in terms of the appropriateness of the remand. • Concurred fully with Mr. Waring. • Agreed that annexation of the 4.58 square miles to the City of Homer was in the best interests of the State regardless of the impacts on KESA. • Concluded that neither the City of Homer nor the Commission "cherry-picked" KESA. The 4.58 square miles approved for annexation reflects the proper application of the lawful city annexation standards to the evidence in the original proceeding.

Allan Tesche (continued)

- Agreed that the Court's creation of the "new standard" is beyond the scope of its authority and proper role.
- Agreed that the Court inappropriately substituted its judgment for that of the Commission.
- Concurred that annexation of 4.58 square miles to the City of Homer did not render KESA unfeasible.
- Fully supported the Department's analysis, conclusions, and recommendations.
- Urged the Commission to affirm the December 26, 2001, Homer annexation decision.

PART III – CONSIDERATION OF COMMENTS

As reflected above, comments on the Department's *Preliminary Report on Remand* dealt with a wide range of topics. In a number of cases, the commentators reiterated beliefs that had been expressed previously in this proceeding, that were settled by the Court, or raised nonresponsive concerns. In other cases, specific concerns were expressed about the analysis and conclusions in the *Preliminary Report on Remand*.

In preparing this *Final Report on Remand*, the Department focused on the effect of the City's 2002 annexation of territory on KESA. While the Department reviewed and considered all timely and relevant comments regarding its *Preliminary Report on Remand*, it is not practical to respond to each of them here. However, the following gives examples of the comments and includes a brief response by the Department.

Comment: Different sets of numbers were used by commentators, and it is difficult to determine which data are valid.

Response: To address the impact of annexation on KESA in its *Preliminary Report on Remand*, the Department relied upon data provided by the Borough regarding taxable value of the territory within KESA and the annexed area. In that regard, the Borough stated as follows on page 1 of its comments of June 24, 2004:

Effective January 1, 2002, the taxable real and personal property in KESA was valued at \$238,585,300. After the annexation, the annexed area was excluded from property available for taxation for the service area. Accordingly, the taxable value for the service area was reduced to

\$177,162,069 immediately upon annexation. This constituted a reduction in taxable property of 25.8 percent based on the value of property as of January 1, 2002.

Thus, the data provided by the Borough indicates that the annexed area had a taxable value of \$61,423,231 as of January 1, 2002 (\$238,585,300 minus \$177,162,069).

Many other figures have been offered to the Commission for consideration in the course of this remand and the original proceeding. For example, on page 2 of its comments of June 24, 2004, the City stated that the assessed value of KESA prior to annexation was \$216,588,767. That figure is \$21,996,533 less than the \$238,585,300 figure provided by the Borough.

Ms. Fuller indicates on page 3 of her comments of August 30, 2004, that the City's figure did not include the value of taxable property in Millers Landing. She asserts, incorrectly, that Millers Landing was added to KESA on January 1, 2002.

In fact, Millers Landing was added to KESA on February 5, 2002. (See Borough Ordinance 2001-48 included in this report as Appendix D).⁹ Ordinance 2001-48 purported to make the addition of Millers Landing "retroactive to January 1, 2002." (See Section 2 of Ordinance 2001-48.) Even if it were proper to provide for the retroactive addition of Millers Landing to KESA, there certainly was no evidence prior to February 5, 2002, that Millers Landing would, in fact, be added to KESA.

Given that circumstance, a reasonable argument could be made in this remand proceeding that the figure provided by the City should be used rather than the figure provided by the Borough. The Commission has directed that written comments based on evidence dated or events occurring after January 17, 2002, will be rejected in its remand deliberations. Clearly, it was not known by that key date whether Millers Landing would have been added to KESA.¹⁰

⁹The addition of Millers Landing to KESA was subject to the preclearance requirements of the Federal Voting Rights Act. That process normally requires more than 60 days. A preclearance request could not have been submitted to the U.S. Department of Justice regarding the addition of Millers Landing until Ordinance 2001-48 was adopted. Implementation of the service area boundary change (addition of Millers Landing) prior to preclearance would have been improper. The Department is uncertain when or even whether the addition of Millers Landing was precleared under the Voting Rights Act.

¹⁰Responding to comments made by the City, Ms. Fuller admonished the Commission to "not bend the rules" by considering written comments based on evidence dated or events occurring after January 17, 2002 (see Ms. Fuller's comments of August 30, 2004, p. 3).

If the addition of Millers Landing to KESA were not considered in this remand, then it could be further argued that impact of annexation on KESA should be judged in the context of KESA's original tax base.¹¹ In other words, instead of characterizing the impact of annexation as reducing KESA's tax base from \$238,585,300 to \$177,162,069 (a 25.7 percent reduction), the impact might be more appropriately characterized as reducing KESA's tax base from \$216,588,767 to \$177,162,069 (a reduction of 18.2 percent).

The Department notes that Ms. Fuller and CCAA use yet a different figure for the value of taxable property in Millers Landing – one that is nearly three times greater than the amount suggested by the City's figure. In two places, Ms. Fuller and CCAA each indicate that Millers Landing had an assessed value on January 1, 2002, of \$61,782,940.¹²

Moreover, the Department notes that in the original annexation proceedings, the Commission had, based on data provided by the Borough, estimated the 2001 value of taxable property in the 4.58 square mile territory approved for annexation to be \$58,364,179.¹³ As noted above, that 2002 figure stated by the Borough is \$61,423,231 (\$3,059,052 or 5.2 percent more than the estimate used by the Commission in the original proceedings.) Of course, the 2002 value of taxable property in the areas in question were not determined until well after January 17, 2002.

Clearly, there are a multitude of numbers that could be used in the analysis of the impact of annexation on KESA. The Department utilized figures provided by the Borough in its comments of June 24, 2004, for

¹¹In terms of KESA's tax base, it is noteworthy that it had been reported to the Borough Assembly following certification of the petition to create KESA, that the proposed service area had a taxable value (based on prior year data) of \$199,193,000 and a population of 10,539. See memorandum from Dale Bagley, Borough Mayor, May 25, 2000, p. 2, included here as Appendix E. In other words, the Assembly was advised that the proposed service area had a per capita taxable value of \$18,900.56. That figure compares to the figures used in the Department's Remand Preliminary Report of \$47,413.61 in taxable property per KESA resident before annexation and \$42,854.88 after annexation. The per capita value of taxable property in KESA following the Homer annexation is more than twice the per capita figure put before the Assembly following certification of the petition to form the service area.

¹²See attachments to CCAA's Comments dated September 1, 2004, consisting of (1) e-mail note from Abigail Fuller to "jcamp@borough.kenai.ak.us" dated June 16, 2004; and (2) "KESA_Miller Landing.xls,1." On page 2 of her comments of August 30, 2004, Ms. Fuller incorporated "by reference CCAA's Comments on the Remand Preliminary Report."

¹³The 3.3 square miles recommended for annexation in the Department's Preliminary Report was estimated to have a taxable value of \$56,386,900 (Preliminary Report, p. 357, n. 85). The Department's Final Report recommended annexation of a net additional 0.6 square miles. That additional area was estimated to have a taxable value of \$1,681,979 (Final Report, p. 33). In addition to the 3.9 square miles recommended for annexation, the Commission approved the annexation of another 0.68 square miles. That additional territory was estimated to have an assessed value of \$295,300 (see LBC decisional statement, p. 20), \$56,386,900, plus \$1,681,979, plus \$295,300 equals \$58,364,179.

three fundamental reasons. First, the Borough is the authority on the value of taxable property in the area in question because it has sole legal responsibility for property tax assessment in the City of Homer and KESA. Second, the Borough is legally responsible for the operation of KESA. Lastly, even though Millers Landing was added to KESA after January 17, 2002, consideration of the impact of the loss of Millers Landing on KESA seems to present a more fair analysis of the issue on remand.

The Department continues to believe that it is reasonable to rely on the figures provided by the Borough in its comments of June 24, 2004. However, if the Commission wishes to strictly adhere to the exclusion of evidence dated or events occurring after January 17, 2002, or if the Commission directs the use of other data, the Department is prepared to fully cooperate by providing additional analysis. As noted above, alternative figures (e.g., those excluding the value of KESA) can be used to show that the fiscal impact on KESA is less than that stated by the Department.

Comment: Object to the information by the City that relates to events occurring after the January 17, 2002, time limit established by the Commission.

Response: The Department did not review or analyze that information.

Comment: The Department did not adequately address the issue before the LBC.

Response: The Department respectfully disagrees. First, the Department considers that an understanding of the relevant background, history, and law applicable to a case is important in every proceeding as it helps clarify the record. When a "reviewing court sees in the record a reasonable basis of support for the commission's reading of the standards and its evaluation of the evidence,"¹⁴ the court will affirm the agency's decision. In this instance, it is even more critical as none of the current members of the Commission participated in the original annexation proceedings. Moreover, there are undoubtedly new residents in the City and Borough who are interested in the issue but may not be as familiar with the case as the commentators are.

Second, the fact that a commentator disagrees with the Department's conclusions and recommendations does not mean the issues were not adequately evaluated. The Department believes the issue on remand was thoroughly and accurately addressed.

¹⁴*Mobil Oil*, p. 93.

Comment: The Department cited the incorrect set of regulations, particularly with regard to the best-interest-of-the-state standard.

Response: When discussing the regulations in a broad sense such as with regard to the Commission's mandatory duty to adopt standards and the new standard imposed by the Court or when quoting others, the Department did cite to the current annexation standards. However, when identifying the annexation standards in the report, the Department did so in a summary fashion rather than including the regulations verbatim. Of particular note in that regard, when referring to the best-interest standard, the Department cited only to AS 29.06.040,¹⁵ not the current regulation at 3 AAC 110.135. Inasmuch as the current regulations are the only ones available through an online search, to avoid confusion the current regulations were appended to the report. Moreover, the annexation decisions cited and discussed in the report were based on the same best-interest-of-the-State standard applicable at the time of the Homer annexation decision.

Nonetheless, it is worth noting that provisions in 3 AAC 110.135 are either specified by the Alaska Constitution or are within the Commission's broad discretionary authority to consider. In addition, the factors listed in 3 AAC 110.135 are not exhaustive;¹⁶ i.e., the Commission may consider any number of other relevant factors it considers appropriate when making a best-interest-of-the-State determination.

¹⁵AS 29.06.040(a) provides in pertinent part:

The Local Boundary Commission may consider any proposed municipal boundary change. The commission may amend the proposed change and may impose conditions on the proposed change. If the commission determines that the proposed change, as amended or conditioned if appropriate, meets applicable standards under the state constitution and commission regulations and is in the best interests of the state.

It is worth noting that the requirements of this section specifically separates the best-interest determination from the constitutional and regulation standards.

¹⁶The provisions of 3 AAC 110.135 provide in relevant part:

In determining whether annexation to a city is in the best interest of the state under AS 29.06.040(a), the commission **may** consider relevant factors, **including** whether annexation . . . (emphasis added).

The word *may*, in itself, is discretionary. The word *including* in Alaska law is governed by AS 01.10.040(b) as follows:

Sec. 01.10.040. Words and phrases; meaning of "including".

. . . .

(b) When the words "includes" or "including" are used in a law, they shall be construed as though followed by the phrase "but not limited to."

Accordingly, the Commission may consider an unlimited number of factors to determine whether they are in the best interests of the State without those factors being set out in regulation form.

Comment: The Department did not comment on the deleterious effects that denial of annexation will have on the City.

Response: The Department believes that the deleterious effects were addressed in the original annexation proceedings that found the City's petition to add territory should be amended and approved to add 4.58 square miles of territory to the City's boundaries.

PART IV - EFFECT OF ANNEXATION ON KESA

Based on the timely comments on its *Preliminary Report on Remand*, the Department gave further consideration to the effect on KESA of the City's annexation of 4.8 square miles of territory. After careful consideration and review of the comments in light of the laws governing annexation and service areas and the facts in this proceeding, the Department determines that the analysis and conclusions reached in its *Preliminary Report on Remand* are valid and should be reaffirmed, with two key additional observations.

The first is in terms of the creation of KESA. The Department noted in its *Preliminary Report on Remand* that those who created KESA did so with the full knowledge that part of the new service area could be annexed to the City. What is noted additionally in this final report, is that the boundaries of KESA were expanded after the Commission rendered its annexation decision. The territory so added to KESA was within the territory approved by the Commission for annexation to the City.

The second is that Allan Tesche, a member of the Commission that rendered the original Homer annexation decision, has indicated his full concurrence with the views expressed in this matter by the former LBC Chair.

In brief, the Department's analysis and conclusions are as follows:

In March 2000, the City petitioned the Commission to expand the City's jurisdictional territory by 25.64 square miles. Over the following twenty-one months, the proposal was addressed at great length.

The level of written responsive comment on the proposal was unparalleled for any city annexation proceeding in Alaska.¹⁷ The City responded to those comments in a formal reply brief. The Department, as staff to the Commission, then reviewed the entire written record (City's Petition,

¹⁷During the initial opportunity for written comment on the matter, 14 responsive briefs comprising 751 pages (including exhibits) were filed with the LBC. Additionally, 168 responsive letters were submitted.

responsive briefs, public comments, and the City's Reply Brief) and conducted its own research and analysis. Following such review, research, and analysis, LBC Staff published a 412-page Preliminary Report with recommendations to the LBC regarding the matter (*Preliminary Report Regarding the City of Homer's Proposal for Annexation of an Estimated 25.64 Square Miles* ("Annexation Preliminary Report"). The Annexation Preliminary Report was widely circulated for public review and comment. Thirty-two sets of comments on the Annexation Preliminary Report were submitted. After considering those comments, LBC Staff published its Final Report on the matter.

In December 2001, the LBC traveled to Homer. Touring by helicopter and automobile, the Commission spent several hours inspecting the territory proposed for annexation. After the inspection, the LBC held a two-day public hearing in Homer. Over the course of the hearing, 91 summaries, opening statements, testimonies, comments, and closing statements were presented to the Commission. Following the conclusion of the hearing, the LBC deliberated in open session for approximately two hours regarding the proposal.

Based on the application of evidence to the applicable standards formally established in law, the LBC determined that annexation was warranted, albeit for a territory substantially smaller than that sought by the City. The Commission determined that the legal standards were best met at that time by limiting annexation to 4.58 square miles. The LBC amended the City's Petition to reduce the size of the territory and then approved the amended Petition. See *Statement of Decision in the Matter of the March 20, 2000 Petition by the City of Homer for Annexation of Approximately 25.64 Square Miles*, Local Boundary Commission, December 26, 2001 (*Homer Decision*).

Six individuals or groups asked the Commission to reconsider its decision. The Commission met to address those requests. The LBC concluded that none of the requests provided a basis for it to reconsider the matter. Consequently, all requests were denied.

In January 2002, the Commission submitted the amended annexation proposal to the Alaska Legislature for its review under Article X, Section 12 of the Constitution of the State of Alaska.¹⁸ What followed was a level of review of the proposal by the Legislature at the committee level that far exceeded the customary careful consideration of LBC boundary

¹⁸Article X, Section 12 states, in relevant part, that the Commission, ". . . may present proposed changes to the legislature during the first ten days of any regular session. The change shall become effective forty-five days after presentation or at the end of the session, whichever is earlier, unless disapproved by a resolution concurred in by a majority of the members of each house."

proposals.¹⁹ Ultimately, the Legislature tacitly approved the action of the Commission by not vetoing the proposal in the manner allowed under the Constitution.

Following the requisite Federal Voting Rights Act review by the U.S. Justice Department, the 4.58-square mile annexation took effect March 20, 2002.

The Commission's action was appealed to the Superior Court by multiple parties. In December 2003, the Superior Court affirmed all aspects of the Commission's decision except one.

The Superior Court concluded that, the LBC had erred when it failed to consider the impact annexation would have on KESA. KESA is a new service area created by the KPB shortly after the City filed its annexation Petition. The original boundaries of KESA encompassed an estimated 218.69 square miles, overlapping all but 0.26 of the 25.64 square miles petitioned for annexation.²⁰ The KPB added that 0.26 square-miles of territory to KESA's boundaries on February 5, 2002 (the action was purported to be retroactive to January 1, 2002).

In rendering its decision in December 2003, the Superior Court remanded the City's amended annexation Petition to the Commission to discuss the impact of annexation on KESA. The Alaska Department of Law and the City of Homer requested that the Court reconsider its decision. The Superior Court denied those requests.

Because the action taken by the Superior Court in this proceeding does not constitute final judgment, there was no automatic right to appeal. Alaska Rule of Appellate Procedure 402(b)(2) states, "Review is not a matter of right, but will be granted only where the sound policy behind the rule requiring appeals to be taken only from final judgments is outweighed

¹⁹The Community and Regional Affairs (CRA) Committee of each house is the standing committee that has jurisdiction over proposals by the Commission for municipal boundary changes subject to legislative review. At the time, both the Chair of the five-member Senate CRA Committee and one of the seven members of the House CRA Committee represented the territory within the boundaries of the City of Homer and the territory petitioned for annexation. The Senate and House CRA Committees met jointly regarding the annexation proposal on three occasions for a total of nearly seven hours. The House CRA Committee met on one additional instance regarding the proposed annexation for approximately 1.5 hours. Legislative review of the annexation proposal, in effect, ended when the House CRA Committee rejected a motion on a 6-1 vote to pass out of the Committee a resolution vetoing the annexation. The House CRA Committee Chair from Aniak cast the lone dissenting vote.

²⁰The 0.26 square-mile territory is known as Millers Landing. That territory was apparently inadvertently excluded from KESA originally. Notwithstanding the exclusion, voters in Millers Landing had voted on the question of authorizing the Borough to exercise powers within the original boundaries of KESA.

... ." Neither the Alaska Department of Law nor the City petitioned the Supreme Court for review of the Superior Court remand.²¹

None of the current members of the Commission participated in the original annexation proceedings since all were appointed to their current terms after March 2002. When the current members of the Commission were advised of the action taken by the Court, one member declared potential conflicts of interest. The Commissioner who declared the potential conflicts indicated that his recusal from the proceedings seemed warranted under the State Executive Branch Ethics Act and other applicable standards. He requested that the LBC Chair rule on the matter. In March 2004, after consulting with the Alaska Department of Law, the LBC Chair recused the Commissioner from the Homer annexation remand proceeding.

In May 2004, the four members of the Commission who will consider this matter adopted procedures for this remand proceeding. Those procedures require the Department to prepare this *Final Report on Remand*.

The Superior Court indicated in its remand order that it "finds the lack of consideration given to the effect annexation would have on KESA troubling." (*Kachemak Area Coalition v. City of Homer*, 3 AN-02-0426 CI (Alaska, December 4, 2003),²² p. 21.) The Court noted that "there is much mention of KESA within both the Department's Preliminary and Final Reports as well as the whole record. However . . . [t]here is no indication any discussion took place regarding the impact annexation would have on the remainder of KESA." (*Ibid.*, p. 20.) The Court concluded that, "a discussion of the effect annexation would have on surrounding services [sic] areas, was warranted to ensure that the annexation was indeed in the best interests of the state. There is no evidence that any such discussion ever occurred. Thus a remand is appropriate to ensure that the LBC considers this issue." (*Ibid.*, p. 22.)

In remanding this issue to the LBC, the Department believes the Court has, in effect, created and imposed a new city annexation standard. Implicit in that new standard is a provision that annexation of a portion of a borough service area to a city can satisfy the "best interests of the state"²³

²¹The Commission did not have an opportunity to timely consider the matter of seeking review of the Court's decision.

²²A copy of *Kachemak Area Coalition v. City of Homer* was included in the Department's *Preliminary Report on Remand* as Appendix B.

²³See AS 29.06.040(a), 3 AAC 110.135, and 3 AAC 110.980.

requirement only if the annexation has no significant adverse effect on the remnant service area.²⁴

As occurred in this case, it is not uncommon for new borough service areas to be created or expanded in response to the prospect of city annexations. The Commission members that rendered the Homer decision were well aware of that circumstance. Those Commission members were equally aware of the constitutional and statutory preference for city annexation versus creating a new service area.



Alaska Constitutional Convention in Session, 1956
Archives, University of Alaska, Fairbanks

It is an issue with which a majority of those particular Commission members had grappled in three prior cases discussed in Chapter 3 of the Department's *Preliminary Report on Remand*. In one of those prior cases, annexation critics argued – as is implicit in the new standard imposed by the Court in the Homer remand proceeding – that borough service areas are constitutionally preferred over (or on par with) city annexation.

The distinguished Victor Fischer, one of the paramount experts in Alaska's Constitution and local government,²⁵ advised the Commission that:

The position that establishment of new service areas is the constitutionally preferred alternative to city annexation or on par with cities is completely wrong, it's nonsense. There is no

²⁴While not explicit in the order, it appears that the corollary to the remand issue is that if there is a significant adverse effect on KESA, then the LBC's approved annexation to the City is voidable.

²⁵Mr. Fischer is recognized by the Alaska Supreme Court as "an authority on Alaska government." (*Keane v. Local Boundary Commission*, 893 P.2d 1239, 1244 (Alaska 1995).) He received a bachelor's degree from the University of Wisconsin in 1948 and a Master's Degree in Community Planning from the Massachusetts Institute of Technology in 1950. In 1955, Mr. Fischer was elected as a delegate to the Alaska Constitutional Convention held in 1955-1956. During the convention, Mr. Fischer served on both the Committee on Local Government and the Style and Drafting Committee; he held the position of Committee Secretary on the former. In 1961-1962, Mr. Fischer received the Littauer Fellowship in public administration from Harvard University. Mr. Fischer has held several planning related positions in Alaska. He has written and co-authored a number of books and publications concerning state and local government in Alaska. These include *The State and Local Governmental System* (1970), *Borough Government in Alaska* (1971), *Alaska's Constitutional Convention* (1975), and *Alaska State Government and Politics* (1987). Mr. Fischer served in Alaska's Territorial House of Representatives (1957-1959) and the Alaska State Senate (1981-1986). He was a member of the faculty of the University of Alaska Fairbanks and of the University of Alaska Anchorage. At the University, he was primarily associated with the Institute for Social and Economic Research (ISER), where he was director for ten years.

basis whatsoever to support that view. All provisions of Article X make it totally obvious that there are two preferred types of local government units under Alaska's constitution: cities and boroughs. Service areas are subsidiary units of boroughs. Section 5 unequivocally establishes that annexation is a preferred alternative to creation of a new service area.

Victor Fischer, September 29, 1997, letter, p. 1-2.

In its *Homer Decision*, the LBC concluded as follows (p. 29):

The legal ability of the [KPB] to provide services to the territory proposed for annexation is circumscribed by the provisions of Article X, § 5 of the Constitution of the State of Alaska and AS 29.35.450(b). Accordingly, no overriding significance is ascribed to the establishment of the Kachemak Emergency Service Area with respect to the capability of the Kenai Peninsula Borough to serve the territory proposed for annexation.

The Commission's decision to allow annexation of 4.58 square miles, notwithstanding concerns expressed by annexation opponents regarding the impact on KESA, involved expertise regarding both a complex subject matter and fundamental policy formulation. By compelling the LBC to address the imposed new standard, the Superior Court has substituted its judgment for that of the Commission. Under long-established principles, deference should have been given to the LBC's judgment under those circumstances. See *Keane* at 1241; *Lake and Peninsula Borough v. Local Boundary Commission*, 885 P.2d 1059,1062 (Alaska 1994); *Mobil Oil Corp. v. Local Boundary Commission*, 518 P.2d 92,97-8 (Alaska 1974).

The imposed new standard created by the Court in its remand order is strikingly inconsistent with the clear preference set out in Alaska's Constitution and Statutes for city annexation over creation of a new borough service area. Accordingly, it would be improper to apply that standard here or in any future annexation proceeding.²⁶

The former LBC member who was Chair of the Commission²⁷ throughout the original Homer annexation proceeding expressed similar views

²⁶Even assuming, *arguendo*, that the imposed new standard complied with the Alaska Constitution and Statutes, the Commission is obligated to adopt annexation standards in regulation (AS 44.33.812(a)(2)). Adoption of such a standard by the Commission would be subject to the regulation adoption provisions of the Administrative Procedure Act (AS 44.62) (APA). The Department questions whether the due-process requirements of the APA would be violated if the LBC considers the imposed new standard without its adoption as a regulation.

²⁷Kevin Waring was appointed to the Commission on July 15, 1996, and served as LBC Chair from July 10, 1997 until March 1, 2003. The Department considers Mr. Waring to have con-

regarding these issues. Moreover, Allan Tesche,²⁸ a member of the Commission that rendered the original Homer annexation decision, has indicated his full concurrence with the views expressed in this matter by the former LBC Chair.

The views expressed by the former Chair and shared by former Commissioner Tesche include the following comments:

[T]he legal premises underlying Judge Rindner's decision to remand are unsettling in several respects. As best I can tell, the ruling that the Commission **must** explicitly consider annexation impacts on a remnant service area as part of its determination of the "best interests of the state" has no constitutional, statutory, or regulatory foundation. Further, it appears to run counter to a previous Alaska Supreme Court decision requiring the Commission to ground its decisions on regulatory provisions. This matters greatly on both counts.

First, Judge Rindner's ruling will have implications for many proposed city annexations. City annexation proposals frequently impinge on adjacent service area boundaries. Recent examples include annexation proposals by the cities of Ketchikan, Kodiak, and Haines.^[29]

siderable expertise regarding local government in Alaska. In addition to his service on the Commission, he has had a distinguished career in other local and state governmental affairs in Alaska. He was the first director of the Division of Community Planning in the former Alaska Department of Community and Regional Affairs (1973-1978). Between 1980 and the spring of 1998, he operated a planning/economics consulting firm in Anchorage. From the spring of 1998 until early 2000, Mr. Waring was employed as manager of physical planning for the Municipality of Anchorage's Community Planning and Development Department. He has since returned to private consulting. Mr. Waring has been active on numerous Anchorage School District policy and planning committees and boards of the Municipality of Anchorage.

²⁸See comments from Allan Tesche dated August 26, 2004. Mr. Tesche served on the Local Boundary Commission from July 10, 1997, to March 1, 2003. He is currently an attorney in private practice in Anchorage, specializing in administrative and municipal law. Mr. Tesche moved to Anchorage 30 years ago, where he was first employed with the legal department of the former Greater Anchorage Area Borough. After the Municipality of Anchorage was created through unification, he served as Deputy Municipal Attorney. He later served as Borough Attorney for the Matanuska-Susitna Borough. He is a founder and past president of the Alaska Municipal Attorneys' Association and served as a member of the attorneys' committee that assisted the Alaska Legislature in the 1985 rewrite of Title 29 of the Alaska Statutes dealing with municipal government. In April 1999, Mr. Tesche was elected to the Assembly of the Municipality of Anchorage. He was subsequently re-elected to the Anchorage Assembly to a term expiring in 2005. He currently serves as Vice-Chair of the Anchorage Assembly, Co-Chair of the Assembly Finance Committee, and Co-Chair of the Assembly Elections Committee.

²⁹Footnote 3 in original. The Commission's decision statements in those cases offer a principled and consistent analysis of issues stemming from city annexation of service areas.

Second, Judge Rindner's ruling that the Commission must consider a factor that is not codified in law or regulation is inventive.^[30] It effectively nullifies the protection that established standards afford to all parties in a proceeding. It exposes the Commission and others to unforeseeable second-guessing. If left unchallenged, it invites mischief in future city annexation proceedings.

. . . No law or regulation requires the Commission to address the impacts of annexation on a service area or remnant service area.

Review of relevant statutes and regulations indicates that this lack is considered and purposeful, and reflects a consistent public policy posture on the relative status of city and borough municipalities and service areas

. . . .

Clearly, the Alaska Constitution and the Alaska legislature, and the Commission following their lead, have a heightened regard for municipalities compared to their service areas.

Judge Rindner's remand decision is problematic in light of two other Alaska Supreme Court decisions.

. . . .

. . . Judge Rindner's ruling seemingly stands the Alaska Supreme Court's ruling in *U.S. Smelting* on its head by requiring the commission to address an extra-regulatory standard.^[31]

Also puzzling is why Judge Rindner applied "independent judgment" rather than the "reasonable basis test" to the issue of whether the Commission properly considered impacts on the KESA, especially given his cite of and quotes from *Mobil Oil Corp.*^[32]

Kevin Waring, responsive comments, June 24, 2004, pp. 2 - 4.

³⁰Footnote 4 in original. The Commission's **discretionary** authority to consider any facts it deems relevant is not here in question. This discretionary authority is implied by AS 29.06.040 which states that the commission **may** (not must) accept a proposed annexation that satisfies applicable statutory and regulatory standards.

³¹*United States Smelting, Refining and Mining Company v. Local Boundary Commission*, 489 P.2d 140 (Alaska 1971), hereinafter referred to as "*Nome*."

³²*Mobil Oil*, *supra*.

The Commission has jurisdiction over city annexations; it has no jurisdiction over borough service areas. Those who created KESA with boundaries encompassing all of the territory petitioned for annexation bear sole responsibility for any concerns regarding adverse effects of annexation on KESA. KESA's creators acted notwithstanding the constitutional and statutory limitations on the creation of new service areas. KESA was formed after the City petitioned for annexation. What is even more remarkable is that the boundaries of KESA were expanded after the Commission rendered its annexation decision and that the expanded territory was within the territory approved by the Commission for annexation to the City.

Those who created KESA were well aware of the pending annexation proposal. Well before KESA was created, the prospect was widely recognized that all or some portion of the 25.64-square mile portion of the proposed service area would be removed as a result of annexation to the City.³³

The annexation of 4.58 square miles has been derisively characterized as "cherry-picking" KESA because the territory is more densely populated and has a greater per-capita tax base compared to the remainder of KESA. Those who portray the City's and Commission's actions as such must be unfamiliar with the "limitation-of-community doctrine." (See *Mobil Oil* at 100.) That doctrine restricts the jurisdictional boundaries of city governments to more urban and developed territories. On average, the boundaries of city governments in Alaska encompass only about 27 square miles.

The limitation-of-community doctrine is a foundation upon which the legal standards for city annexation have been developed. For those familiar with the doctrine, it comes as no surprise that application of the annexation standards by the LBC resulted in annexation of only a 4.58-square-mile portion of the KESA's 218.95 square miles. Given the limitation-of-community doctrine, it is not at all remarkable that the 4.58-square mile annexed territory is more densely inhabited and has a higher per capita tax base compared to the 214.37-square mile remnant area of KESA.

The allegation of "cherry picking" KESA and the Court's reliance on that argument in its remand decision is baseless. Aside from the view held by the Department and others that inclusion in KESA of territory that was annexed to the City violated Alaska's Constitution³⁴ and Statutes and

³³Clearly, the prospect exists that some day, additional portions of the remnant KESA will be annexed to the City of Homer. In a broader context, all service areas in every organized borough remain subject to boundary changes from city annexations and city incorporations.

³⁴The Department observed in its Annexation Preliminary Report (p. 306):

assuming for the sake of argument that "cherry-picking" could be at issue in an annexation or incorporation proceeding, in this case the very history of the City's annexation effort vis-à-vis the creation of KESA militates against such claim. There was no KESA to cherry-pick when the City began its annexation effort. The City's consideration of annexing the territory formally began on December 13, 1999; the Petition was submitted March 20, 2000; accepted for filing by the Department on March 29, 2000; and public notice thereof issued April 3, 2000. All these events predated the establishment of KESA. The first signature on a petition to create KESA was dated April 12, 2000. Following the election regarding that creation, the KPB approved the formation on August 15, 2000. By that time, the City's formal annexation effort was nine months old.

It was the Commission's decision, and the Legislature's approval thereof, that narrowed the size of the territory being annexed. That decision was based on the strictures of Alaska's Constitution and Statutes and application of the Commission's 14 annexation standards, which are law and adopted under mandate from the Alaska Legislature and the Alaska Supreme Court.

Applying the law (i.e., the annexation standards) to the City's Petition, the Commission determined that the State's best interest was served by approving only about one-fifth of the territory requested by the Petitioner. The Legislature tacitly approved that determination. As long as a Commission decision has a reasonable basis of support for the LBC's reading of the standards and its evaluation of the evidence, the decision should be affirmed by the Court.³⁵ However, rather than so affirming, the Court imposed a new standard in this instance.

It is difficult for the Department to reconcile the role of the Court with its imposition of a new standard into the consideration of public-policy issues involving annexation. The Alaska Constitution created the Commission "to provide an objective administrative body to make state-level decisions regarding local boundary changes, thus avoiding the chance that a small, self-interested group could stand in the way of boundary changes which

The Kachemak Emergency Service Area was established in October 2000, more than six months after the City . . . filed its annexation petition. To date, there has been no formal legal challenge over the creation of the service area in terms of the previously noted limitations set out in Article X, Section 5 of the Constitution and AS 29.35.450(b).

Moreover, during the legislative review of the proposal, the Director of Legal Services for the Legislative Affairs Agency cited Article X, Section 5 of Alaska's Constitution and noted that KESA, "was probably invalidly established." (Memorandum from Tamara Brandt Cook, January 9, 2002, p. 2.)

³⁵*Mobil Oil* at 98; *Keane* at 1241.

were in the public interest."³⁶ The Alaska Supreme Court also stated: "The policy decision as to . . . annexation is an exercise of lawfully vested administrative discretion which we will review only to determine if administrative, legislative or constitutional mandates were disobeyed or if the action constituted an abuse of discretion."³⁷ Here, the Court takes the opposite approach. In its new standard, the Court ignores the constitutional and statutory preference for annexation over creation of service areas and rewrites the law to, in effect, supersede that preference.

In *Nome*, the Alaska Supreme Court stated:

Without doubt there are questions of public policy to be determined in annexation proceedings which are beyond the province of the court. Examples are the desirability of annexation, as expressed in published standards. Judicial techniques are not well adapted to resolving these questions. In that sense, these may be described as political questions, . . . beyond the compass of judicial review.

Nome at 143, emphasis added.

In accordance with Article X, Sections 5 and 12 of the Alaska Constitution, AS 29.06.040 - .060, and AS 44.33.812(a), the Commission has provided such published annexation standards (3 AAC 110.090 - 3 AAC 110.150 and 3 AAC 110.900 - 3 AAC 110.910). Based on the conclusions in *Nome, supra*, the Department believes the Court's creation of the new implied standard is "beyond the compass" of its authority and proper role.

As discussed more fully in Chapter 3, the issue of a court exceeding its authority has been addressed in numerous cases. The U.S. Supreme Court has stated that, "The responsibilities for assessing the wisdom of . . . policy choices and resolving the struggle between competing views of the public interest [in this instance, annexation versus service area creation] are not judicial ones: 'Our Constitution vests such responsibilities in the political branches' [i.e., the executive (Commission) and the legislative (Legislature)]."³⁸

A 1981 decision by the Alaska Supreme Court dealt precisely with the issue of the court's role in a dispute stemming from city annexation. The case involved the question whether annexation to the City of Haines re-

³⁶*Port Valdez Co. v. City of Valdez*, 522 P.2 1147, 1150 (Alaska 1974).

³⁷*Port Valdez* at 1151.

³⁸*Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 866 (1984).

sulted in an increased municipal tidelands entitlement from the State.³⁹ The Alaska Department of Natural Resources (DNR) urged the Court to reject Haines' claim for the increased entitlement, in large part, on public policy grounds. DNR was particularly concerned that if Haines prevailed, it would "open the door to municipal speculation in the ownership of tidelands" through annexation (*Haines* at 1050). The City of Haines stressed that annexation was subject to approval by the LBC, which would apply standards (*Haines* at 1051). The Alaska Supreme Court balked at a policy-making role urged by DNR. It noted that annexation decisions are rendered by the LBC and reviewed by the Legislature (*Haines* at 1051, n. 18). The Court stated, "As to the public policy arguments, they are better addressed to the legislature; that body has ample opportunity to consider them . . . in its review of each municipal expansion"

Notwithstanding the Department's strong conviction that the new standard imposed by the Court in this remand proceeding is improper, in compliance with the Court's directive and to bring this proceeding to a final judgment, the Department has addressed the issue raised by the Court. The Department concludes from the facts in this proceeding that even though the 4.58 square mile territory approved for annexation is more densely populated and has a higher tax base than the 214.37 square-mile remnant service area, annexation has certainly not rendered KESA unfeasible.

As constituted after Millers Landing was added, but before annexation took effect, the 218.95 square miles within KESA's boundaries were inhabited by an estimated 5,032 residents. The taxable value of that territory was \$238,585,300 as of January 1, 2002, \$1,089,679 per square mile. Annexation reduced the size of KESA to 214.37 square miles, its population to 4,134, and its property tax base to \$177,162,069. In relative terms, the KESA's geographic size was reduced by 2 percent; its population was cut by 17.8 percent, and its tax base declined by 25.7 percent.

Before annexation, the population density of KESA was nearly 23 residents per square mile. The population density of the post-annexation boundaries of KESA dropped to 19.3 residents per square mile. While it declined by roughly 16 percent, KESA's population density post-annexation population density was comparable to two other emergency service areas in the Borough (Anchor Point Fire and EMS, and Central Emergency Services, both at 19.7 residents per square mile). Moreover, KESA's population density was far greater than two other fire or emergency service areas of the Borough (Central Emergency Medical

³⁹ *Alaska, Department of Natural Resources v. City of Haines*, 627 P.2d 1047. With regard to service areas, however, the Legislature's actions are also constrained by Article X, Section 5 of the Alaska Constitution.

Service Area at 1.9 persons per square mile, and Nikiski Fire at 1 person per square mile).

Before annexation, KESA's property tax base was approximately \$47,414 per resident. After annexation, the figure declined to approximately \$42,855 per resident, a drop of 9.6 percent. The post-annexation figure is 7 percent less than the \$46,165 per resident for the KPB's Bear Creek Fire Service Area as of January 1, 2002.

Before annexation, each of the 218.95 square miles within KESA held, on average, \$1,089,679 in taxable property. After annexation, that figure dropped to \$826,429 per square mile. However, the figure for KESA remained substantially greater than the comparable measure for three of five other service areas. The figure for KESA following annexation was also substantially greater compared to the average for all five of those service areas.

The Department considers population density, per-capita property-tax figures, and valuation density to be fundamental measures of the viability of providing municipal services in this case. While those measures declined for KESA following annexation to the City, they are certainly not abnormal when compared to other fire protection and emergency service areas within the KPB at the time. The measures are comparable or, in many cases, favorable to other KPB service areas. Obviously, KESA has continued to operate over multiple budget cycles following annexation of the 4.58 square miles to the City. Even the Court seems to recognize that KESA remains viable based on the conclusion at page 20 of the remand order where it states, "KESA was created and will continue to exist even if Homer annexes a portion of it." Thus, the Department concluded that KESA has remained viable following annexation of territory to the City.

PART V – FINAL RECOMMENDATIONS

The Department reaffirms the recommendations set out in its *Preliminary Report on Remand* that

(1) the Commission discuss the effect of annexation on KESA and the limitations in Alaska's Constitution and Statutes on the creation of new service areas; and

(2) the Commission reject as unconstitutional and otherwise unlawful the new Court-imposed standard that the effect of city annexation on existing or prospective borough service areas must be considered in determining the best interest of the State.

Appendix A

May 18, 2004, Order of the Local
Boundary Commission Relating to
Procedures for Consideration of the
Amended City of Homer Annexation
Petition Upon Remand
(Seventeen pages)

STATE OF ALASKA

THE LOCAL BOUNDARY COMMISSION

Before Commissioners:

Darroll Hargraves, Chair
Georgianna Zimmerle
Robert Harcharek
Anthony Nakazawa

UPON REMAND: *IN THE MATTER OF THE*
MARCH 20, 2000, PETITION BY THE CITY OF
HOMER FOR ANNEXATION OF APPROXIMATELY
25.64 SQUARE MILES

)
)
)
)
)

ORDER RELATING TO PROCEDURES FOR CONSIDERATION OF THE
AMENDED CITY OF HOMER ANNEXATION PETITION UPON REMAND

On March 20, 2000, the City of Homer petitioned the Local Boundary Commission (hereinafter "Commission") for annexation of an estimated 25.64 square miles. On December 26, 2001, following proceedings set out in 3 AAC 110.400 – 3 AAC 110.660, the Commission amended the petition to reduce the territory from 25.64 square miles to 4.58 square miles (hereinafter "amended petition"). At that meeting, the Commission also approved the amended petition.

On January 17, 2002, the Commission denied six requests for reconsideration of its decision. On January 23, 2002, the Commission presented to the Second Session of the Twenty-Second Alaska Legislature, a proposal under Article X, § 12 of the Constitution of the State of Alaska, for annexation to the City of Homer of the 4.58 square miles identified in the amended petition. The Legislature tacitly approved the Commission's proposed boundary change on March 9, 2002, by not rejecting the proposal within the time allowed under Article X, § 12. Annexation took effect on March 20, 2002, pursuant to 3 AAC 110.630, upon receipt by DCED of notification of

1 compliance by the City of Homer with regard to 42 U.S.C. 1973c (Voting Rights Act of
2 1965).

3 The Commission's decision was subsequently appealed to superior court.
4 The Court affirmed all aspects of the Commission's decision except one. The Court
5 concluded that, "the LBC erred when it failed to consider the impact annexation would
6 have on [the Kachemak Emergency Service Area (KESA)]." *Kachemak Area Coalition*
7 *v. City of Homer*, 3 AN-02-0426 CI (Alaska, December 4, 2003), p. 22. The Court
8 remanded the City of Homer's amended annexation petition to the Commission to
9 discuss the impact of the March 20, 2002, annexation on KESA.

10 The basis for the Court's opinion that the LBC erred when it failed to
11 consider the impact annexation would have on KESA is outlined on pages 19 – 23 of
12 the Court's December 4, 2003, order. The Court noted at 19:

13 [The appellants (Kachemak Area Coalition, Inc.,¹ *et al.*)] contend that
14 Homer essentially "cherry-picked" KESA. The annexation took a large
15 percentage of KESA's population but left a majority of its territory – over
16 175 square miles. Thus, KESA was left in a predicament in which it had a
greatly reduced tax-base yet remained almost the same size as before the
annexation.

17 Further, the court observed at 20:

18 Appellees in the present case [Commission and the City of Homer] admit
19 to essentially dismissing any impact the Homer annexation would have on
20 KESA, yet at the same time they claim the issue was discussed as much
21 as the situation warranted. The stated reason for the inattention is that the
22 LBC and Homer maintain that KESA was formed illegally and thus did not
deserve serious consideration. Regardless of the motives of those who
petitioned to form KESA, KESA was created and will continue to exist
even if Homer annexes a portion of it. This court must assume that the
remaining service area is legitimate and will be responsible after

23 ¹The full name of this respondent/appellant is "Kachemak Area Coalition, Inc., d/b/a Citizens
24 Concerned about Annexation" but referred to hereafter as "Kachemak Area Coalition, Inc."

annexation for providing services within its new boundaries (citations omitted).

The Court stated further at 21-22:

This Court accepts as true that Homer and the Kenai Peninsula Borough agreed to an amicable transfer of assets. However, given the amount of attention focused on KESA from even before its inception, this Court finds the lack of consideration given to the effect annexation would have on KESA troubling. Mentioning KESA in passing, or in connection with the additional burdens the City planned to take on is not the same as a discussion about the impact annexation would have in view of whether the annexation was in the best interests of the state. Clearly, annexation of the entire service area was not in the state's best interests, as the LBC did not approve even the entire 25+ square miles for which Homer originally petitioned.

Because it was impossible for the City to include a transition plan for KESA at the time of its petition (since it did not yet exist), a discussion of the effect annexation would have on surrounding services [sic] areas, was warranted to ensure that the annexation was indeed in the best interests of the state. There is no evidence that any such discussion ever occurred. Thus, a remand is appropriate to ensure that the LBC considers this issue (citations omitted).

No member of the Commission as currently constituted was a member of the Commission when the original petition came before it. On December 8, 2003, the current Commission Chair was notified by Bob Hicks, a current member of the Commission, that he had potential conflicts of interest with respect to the remanded amended Homer annexation petition. After consulting with the State Attorney General's office, the Commission Chair concurred with Commissioner Hicks that the potential conflicts raised warranted recusal of Commissioner Hicks with respect to matters pertaining to the Homer annexation remand.

The procedures outlined in Sections 1 – 10 of this Order, developed under authority of 3 AAC 110.660, will be used in consideration by the Commission with regard to the amended petition upon remand, based on evidence dated or events

1 occurring on or before January 17, 2002 (the date on which the Commission denied
2 requests for reconsideration of its December 26, 2001, decision). The provisions of
3 3 AAC 110.500 prohibiting ex parte contact with the Commission apply to this remand
4 proceeding.

5 **Section 1 – Public Notice**

6 The Alaska Department of Community and Economic Development
7 (hereinafter "DCED") shall:

8 (a) publish the attached *Notice of Opportunity to Comment Regarding KESA and*
9 *Homer Annexation Remand* (hereinafter "notice of remand") in a display ad format in the
10 Homer Tribune no later than May 26, 2004, and in the Homer News no later than
11 May 27, 2004;

12 (b) arrange for the City of Homer to post no later than May 26, 2004, the notice of
13 remand in at least three prominent locations readily accessible to the public and within
14 the boundaries of the City of Homer;

15 (c) arrange for the City of Homer to ensure that notices posted under (b) of this
16 section remain posted through June 24, 2004, the deadline for receipt by DCED of
17 written comments as outlined in Section 3 of this Order;

18 (d) hand-deliver or mail² no later than May 26, 2004, the notice of remand to the
19 City of Homer; each of the respondents³ in the original Homer annexation proceeding
20 (hereinafter "respondents"); the former Commission members who participated in the

21 _____
22 ²For mailing purposes, a list of the addresses of record is attached hereto. The addresses have
been updated to the extent such information is available to Commission staff.

23 ³There were 14 respondents in the original Homer annexation proceeding, one of whom was
24 Abigail Fuller. She was also a *pro se* appellant in the Homer annexation appeal and, thus, where
appropriate, is included in the list of "counsel" to receive service of records in this remand proceeding.

1 original Homer annexation proceeding; and the respective legal counsel for: the
2 Commission; City of Homer; Alaskan's [sic] Opposed to Annexation, *et al.*; Kachemak
3 Area Coalition, Inc.; and Abigail Fuller;

4 (e) submit no later than May 26, 2004, the attached *Request for PSA Regarding*
5 *Opportunity to Comment Regarding KESA and Homer Annexation* to radio stations
6 listed in *Alaska Media Directory – 03* as serving the Kenai Peninsula (i.e., KBBI-AM;
7 KDLL-FM; KGTL-AM; KKIS-FM; KPEN-FM; KSLD-AM; KSRM-AM; KWHQ-FM; KWVV-
8 FM; and KXBA-FM) and request that it be announced for 14 days following receipt of
9 the request;

10 (f) arrange for the notice of remand to be posted on the Alaska Online Public
11 Notice System (AS 44.62.175); and

12 (g) arrange for the notice of remand to be posted on the Commission's Web site
13 at <http://www.dced.state.ak.us/dca/lbc/lbc.htm> under "Homer Annexation Remand" to be
14 listed in the "Quick Links" directory.

15 **Section 2 – Service of the Record on Appeal and Other Materials for Purposes of**
16 **Remand**

17 (a) At the same time that it provides the notice of remand, DCED shall provide
18 the materials listed below to each participating member of the Commission; the former
19 Commission members who participated in the original Homer annexation proceeding;
20 City of Homer; Homer City Clerk (15 copies); Homer Public Library (15 copies); each of
21 the respondents; and the respective legal counsel for: the City of Homer; Alaskan's [sic]
22 Opposed to Annexation, *et al.*; Kachemak Area Coalition, Inc.; and Abigail Fuller.

23 (1) the complete record on appeal to the superior court in electronic format
24 (Adobe Acrobat pdf on CD);

(2) "Order on Appeal of Local Boundary Commission Decision," *Kachemak Area Coalition v. City of Homer*, 3 AN-02-0426 CI (Alaska December 4, 2003), in electronic format (Adobe Acrobat pdf on CD); and

(3) a printed copy of this Order (with attachments).

(b) Upon request, DCED shall provide the materials listed above to any interested person or entity.

Section 3 – Written comments

(a) An interested person or entity⁴ may file with DCED written comments concerning KESA and the effect on KESA of the annexation of 4.58 square miles to the City of Homer based on evidence dated or events occurring on or before January 17, 2002 (the date on which the Commission denied requests for reconsideration of its December 26, 2001, decision). Written comments based on evidence dated or events occurring after January 17, 2002, will be rejected.

To be considered, the written comments must be received by DCED no later than 4:30 p.m., June 24, 2004.

(b) After June 24, 2004, DCED shall

(1) promptly provide a copy of the written comments to the City Clerk of the City of Homer; and legal counsel for: the City of Homer; Alaskan's [sic] Opposed to Annexation, *et al.*; Kachemak Area Coalition, Inc.; and Abigail Fuller by hand-delivery, electronic mail, facsimile, or postage-prepaid mail;

⁴This may include the City of Homer; any of the respondents; and the respective legal counsel for: the City of Homer; Alaskan's [sic] Opposed to Annexation, *et al.*; Kachemak Area Coalition, Inc.; and Abigail Fuller.

(2) promptly post a copy of the written comments on the Commission's Web site as noted in Section 1 of this Order; and

(3) provide a copy to each participating member of the Commission.

(c) Upon receipt of a copy of the written comments, the City Clerk of the City of Homer shall make the comments available for public review in the Office of the City Clerk.

Section 4 – Reply comments

(a) By July 15, 2004, the City of Homer may file with DCED a reply in response to all timely-filed written comments. The City Clerk of the City of Homer shall make a copy of the City of Homer's reply comments available for public review in the Office of the City Clerk.

(b) Upon receiving the City of Homer's reply comments, DCED shall

(1) promptly provide a copy of the reply comments to the legal counsel for: the City of Homer; Alaskan's [sic] Opposed to Annexation, *et al.*; Kachemak Area Coalition, Inc.; and Abigail Fuller by hand-delivery, electronic mail, facsimile, or postage-prepaid mail;

(2) promptly post a copy of the comments on the Commission's Web site as noted in Section 1 of this Order; and

(3) provide a copy to each participating member of the Commission.

Section 5 – Departmental reports

(a) Following its investigation and analysis of the KESA issues and relevant written comments, DCED shall submit a written report of its findings with recommendations regarding the matter.

1 (b) By August 12, 2004, DCED shall mail its preliminary report with
2 recommendations to each participating member of the Commission; City of Homer;
3 Homer City Clerk (15 copies); Homer Public Library (15 copies); each of the
4 respondents; the respective legal counsel for: the Commission; City of Homer;
5 Alaskan's [sic] Opposed to Annexation, *et al.*; Kachemak Area Coalition, Inc.; and
6 Abigail Fuller; the former Commission members who participated in the original Homer
7 annexation proceeding; and any interested person or entity who requests a copy.

8 (c) Promptly following the mailing of its preliminary report, DCED shall post a
9 copy of the preliminary report on the Commission's Web site as noted in Section 1 of
10 this Order.

11 (d) The City of Homer, each of the respondents, and other interested persons or
12 entities may submit to DCED written comments pertaining to the preliminary report with
13 recommendations. To be considered, the written comments must be received by DCED
14 by 4:30 p.m., September 2, 2004.

15 (e) Upon receiving written comments pertaining to the preliminary report, DCED
16 shall promptly post a copy of the comments on the Commission's Web site as noted in
17 Section 1 of this Order.

18 (f) In its final report, DCED shall consider timely submitted written comments
19 addressing the preliminary report with recommendations.

20 (g) By September 23, 2004, DCED shall mail its final written report with
21 recommendations to each participating member of the Commission; City of Homer;
22 Homer City Clerk (15 copies); Homer Public Library (15 copies); each of the
23 respondents; the respective legal counsel for: the Commission; City of Homer;

1 Alaskan's [sic] Opposed to Annexation, *et al.*; Kachemak Area Coalition, Inc.; and
2 Abigail Fuller; the former Commission members who participated in the original Homer
3 annexation proceeding; and any interested person or entity who requests a copy.

4 (h) Promptly following the mailing of its final report, DCED shall post a copy of
5 the final report on the Commission's Web site as noted in Section 1 of this Order.

6 **Section 6 – Commission public hearing**

7 (a) At least three weeks following the mailing of DCED's final report under
8 Section 5(g) of this Order, the Commission will convene one or more public hearings at
9 convenient locations within the corporate boundaries of the City of Homer.

10 (b) Notice of the date, time, place and subject of the hearing shall be

11 (1) mailed, postage prepaid, by DCED to the City of Homer, each
12 respondent, the respective legal counsel for: the Commission; City of Homer;
13 Alaskan's [sic] Opposed to Annexation, *et al.*; Kachemak Area Coalition, Inc.;
14 and Abigail Fuller; and the former Commission members who participated in the
15 original Homer annexation proceeding;

16 (2) published by DCED at least three times, with the first date of publishing
17 occurring at least 30 days before the date of the hearing, in a display ad format
18 no less than three inches long by two columns wide, in one or more newspapers
19 of general circulation selected by DCED to reach the people in the Homer area;

20 (3) posted by the City of Homer in at least three prominent locations
21 readily accessible to the public in the area in which the hearing is to be held for at
22 least 21 days preceding the date of the hearing;

1 (4) posted by DCED on the Alaska Online Public Notice System
2 (AS 44.62.175); and

3 (5) posted by DCED on the Commission's Web site as noted in Section 1
4 of this Order.

5 (c) DCED shall submit a request for a public service announcement of the
6 hearing notice to the radio stations listed in Section 1(e) of this Order and request that
7 the hearing notice be announced during the 21 days preceding the date of the hearing.

8 (d) The Commission may postpone the time or relocate the place of the hearing
9 by conspicuously posting notice of the postponement or relocation at the original time
10 and location of the public hearing, if the hearing is relocated within the same community
11 or territory and is rescheduled no more than 72 hours after the originally scheduled
12 time.

13 (e) At least 14 days before the hearing, the City of Homer and each respondent
14 shall submit to DCED a list of witnesses that the respective party intends to call to
15 provide sworn testimony. The list must include the name and qualifications of each
16 witness, the subjects about which each witness will testify, and the estimated time
17 anticipated for the testimony of each witness. On the same date that the City of Homer
18 submits its witness list to DCED, the City of Homer shall provide a copy of its witness
19 list to each respondent by hand-delivery or postage-prepaid mail. On the same date that
20 a respondent submits its witness list to DCED, the respondent shall provide a copy of its
21 witness list to the City of Homer and to all other respondents by hand-delivery or
22 postage-prepaid mail.

Section 7 – Commission hearing procedures

(a) The Chair of the Commission shall preside at the hearing and shall regulate the time and the content of statements, testimony, and comments to exclude irrelevant or repetitious statements, testimony, and comments. DCED shall record the hearing and preserve the recording. Two members of the Commission constitute a quorum for purposes of a hearing under this section.

(b) As part of the hearing, the Commission may include

(1) a report with recommendations from DCED;

(2) an opening statement by the City of Homer, not to exceed five minutes;

(3) an opening statement by each of the respondents, not to exceed five minutes;

(4) sworn testimony of witnesses

(A) with expertise in matters relevant to KESA and the effect on KESA of the annexation of 4.58 square miles; and

(B) called by the City of Homer;

(5) sworn testimony of witnesses

(A) with expertise in matters relevant to KESA and the effect on KESA of the annexation of 4.58 square miles; and

(B) called by each respondent;

(6) sworn responsive testimony of witnesses

(A) with expertise in matters relevant to KESA and the effect on KESA of the annexation of 4.58 square miles; and

(B) called by the City of Homer;

1 (7) a period of public comment by interested persons, not to exceed three
2 minutes for each person;

3 (8) a closing statement by the City of Homer, not to exceed five minutes;

4 (9) a closing statement by each respondent, not to exceed five minutes;

5 and

6 (10) a reply by the City of Homer, not to exceed five minutes.

7 (c) If more than one respondent participates, the Chair of the Commission, at
8 least 14 days before the hearing, may establish for each respondent time limits on the
9 opening and closing statements that are lower than those time limits set out in (b) of this
10 section.

11 (d) A member of the Commission may question a person appearing for public
12 comment or as a sworn witness. The Commission may call additional witnesses.

13 (e) A document may not be filed at the time of the public hearing unless the
14 Commission determines that good cause exists for that evidence not being presented in
15 a timely manner for written response by the City of Homer or each of the respondents or
16 for consideration in the reports with recommendations of DCED.

17 (f) The Commission may amend the order of proceedings and change allotted
18 times for presentations if amendment of the agenda will promote efficiency without
19 detracting from the Commission's ability to make an informed decision.

20 **Section 8 – Decisional Meeting**

21 (a) Within 90 days after the last Commission hearing on the matter, the
22 Commission will convene a decisional meeting to examine the written comments and
23 testimony, make findings and reach conclusions regarding KESA and the effect of the
24 March 20, 2002, annexation upon KESA, and render a decision regarding the matter.

1 The Commission will not receive new evidence, testimony, or briefing during the
2 decisional meeting. However, the Chair of the Commission may ask DCED or a person
3 for a point of information or clarification.

4 (b) Three members of the Commission constitute a quorum for the conduct of
5 business at a decisional meeting.

6 (c) The Commission will keep written minutes of the decisional meeting. Each
7 vote taken by the Commission will be entered in the minutes. The approved minutes are
8 a public record.

9 (d) Within 30 days after the date of its decision, the Commission will file as a
10 public record a written statement explaining all major considerations leading to the
11 decision. A copy of the statement will be mailed to the City of Homer, each of the
12 respondents and their legal counsel, and other interested persons requesting a copy.
13 DCED shall execute and file an affidavit of mailing as a part of the public record of the
14 proceedings.

15 (e) Unless reconsideration is requested timely or the Commission, on its own
16 motion, orders reconsideration, a decision by the Commission is final on the day that
17 the written statement of decision is mailed, postage prepaid to the City of Homer, the
18 respondents, the respective legal counsel for: the Commission; City of Homer;
19 Alaskan's [sic] Opposed to Annexation, *et al.*; Kachemak Area Coalition, Inc.; and
20 Abigail Fuller.

21 **Section 9 – Reconsideration**

22 The process for reconsideration set out under 3 AAC 110.580 shall apply
23 to this proceeding.
24

1 **Section 10 – Service of Decision on Court**

2 A copy of the Commission's decision on remand will be filed with the
3 superior court by the Commission's counsel of record.

4 Approved this 18th day of May 2004.

5 LOCAL BOUNDARY COMMISSION (Commissioner Bob Hicks, not participating.)

6
7 
8

9 By: Darroll Hargraves, Chair

10 Attest:

11
12 
13

14 Dan Bockhorst, Staff

15 Attachments:

- 16
- 17 ▪ *Notice of Opportunity to Comment Regarding KESA and Homer Annexation Remand*
 - 18 ▪ *Addresses of record of the City of Homer, respondents, and legal counsel.*
 - 19 ▪ *Request for PSA Regarding Opportunity to Comment Regarding KESA and Homer Annexation*
- 20
21
22
23
24



NOTICE OF OPPORTUNITY TO COMMENT REGARDING KESA AND HOMER ANNEXATION REMAND

STATE OF ALASKA LOCAL BOUNDARY COMMISSION

Upon remand by the superior court, the Local Boundary Commission will discuss the Kachemak Emergency Service Area (KESA) and effect on KESA of the 4.58 square mile annexation to the City of Homer that occurred March 20, 2002. The court indicated that such discussion is warranted to ensure that annexation was in the best interests of the State.

An interested person or entity may file written comments with the Commission concerning this issue. **Written comments based on evidence dated or events occurring after January 17, 2002 (the date on which the Commission denied requests for reconsideration of its December 26, 2001, decision), will be rejected.** The provisions of 3 AAC 110.500 prohibiting ex parte contact with the Commission apply to this remand proceeding.

A printed copy of the original petition materials is available for review at the office of the Homer City Clerk, 491 East Pioneer Avenue, Homer (telephone: 235-3130). Copies of the record in electronic format (Adobe Acrobat pdf on CD) have been provided to each of the respondents in the original proceeding. Multiple CDs of the record have also been provided to the Homer Public Library and the Homer City Clerk for use by the public. CDs are also available upon request from Commission staff.

To be considered, **written comments must be received in the office below by 4:30 p.m., Thursday, June 24, 2004:**

Local Boundary Commission Staff
550 West Seventh Avenue, Suite 1770
Anchorage, AK 99501-3510

Fax: 907-269-4539
Email: LBC@dcad.state.ak.us

Further information about this matter, including details regarding the procedures to be used by the Commission is posted on the Commission's Web site at <http://www.dcad.state.ak.us/dca/lbc/lbc.htm> under "Homer Annexation Remand" which is listed in the "Quick Links" directory. Inquiries may also be directed to Commission staff by telephone at (907) 269-4559.

**Homer Remand Mailing List
05-19-2004**

Sallie S. Dodd-Butters
P.O. Box 1223
Homer, AK 99603

Vi Jerrel, Ph.D.
P.O. Box 938
Homer, AK 99603

Objective Annexation Review
Attn: Larry Smith
1520 Lakeshore Drive
Homer, AK 99603

Ardith Lynch
P.O. Box 70891
Fairbanks, AK 99707

Walt Wrede, Manager
City of Homer
491 East Pioneer Avenue
Homer, AK 99603

Robert C. Erwin
Counsel for Vi Jerrell, Doris Cabana,
and Alaskans Opposed to Annexation
Erwin & Erwin, LLC
733 West Fourth Avenue, Suite 400
Anchorage, AK 99501

Steve & Margaret Seelye
P.O. Box 962
Homer, AK 99603

Abigail & Timothy Fuller
P.O. Box 3392
Moscow, ID 83843

Doris I. Cabana
P.O. Box 607
Homer, AK 99603

Kachemak Area Coalition, Inc., d/b/a
Citizens Concerned About Annexation
Attn: Peter C. Roberts
P.O. Box 1134
Homer, AK 99603

Raven Ridge Homeowners'
Association
Attn: Wayne Clark
P.O. Box 1335
Homer, AK 99603

Colette Thompson
Borough Attorney
Kenai Peninsula Borough
144 North Binkley Street
Soldotna, AK 99669

The Honorable Jack Cushing
Mayor
City of Homer
491 East Pioneer Avenue
Homer, AK 99603

Gordon Tans
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Counsel for the City of Homer
1029 West Third Avenue
Anchorage, AK 99501

Kevin Waring
2020 Banbury Circle
Anchorage AK 99504

Mary Griswold
P.O. Box 1417
Homer, AK 99603

Bill Smith
P.O. Box 150
Homer, AK 99603

Crossman Ridge Homeowners'
Association
Attn: Cris Rideout
P.O. Box 2430
Homer, AK 99603

Kathleen S. Wasserman
P.O. Box 66
Pelican AK 99832

Mary Calhoun
City Clerk
City of Homer
491 East Pioneer Avenue
Homer, AK 99603

Marjorie Vandor
Assistant Attorney General
Department of Law
P.O. Box 110300
Juneau, AK 99811-0300

Brooks Chandler
Hicks, Boyd, Chandler & Falconer
Counsel for Kachemak Area Coalition, Inc., d/b/a
Citizen's Concerned About Annexation
825 West Eighth Avenue, Suite 220
Anchorage, AK 99501

Allan Tesche
Russell Tesche Wagg
Cooper & Gabbert
510 L Street, Suite 300
Anchorage, AK 99501



**REQUEST FOR PSA REGARDING OPPORTUNITY TO
COMMENT REGARDING EFFECT ON KESA OF 4.58
SQUARE MILE HOMER ANNEXATION**

**PLEASE BROADCAST FOR 14 DAYS
FOLLOWING RECEIPT OF THIS REQUEST**

**STATE OF ALASKA
LOCAL BOUNDARY COMMISSION**

The superior court has directed the Local Boundary Commission to discuss the effect on the Kachemak Emergency Service Area (KESA) of the 4.58 square mile annexation to the City of Homer that occurred March 20, 2002. The court indicated that such discussion is warranted to ensure that annexation was in the best interests of the State.

The Commission is accepting written comments concerning this issue. Comments must be based on the record before the Commission in the original proceeding.

A printed copy of the original petition materials is available for review at the office of the Homer City Clerk, 491 East Pioneer Avenue, Homer (telephone: 235-3130). The record is also available for review in electronic format (Adobe Acrobat pdf on CD) through the Homer Public Library and the Homer City Clerk. CDs are also available upon request from Commission staff.

Written comments must be received by the Commission no later than 4:30 p.m., Thursday, June 24, 2004.

Further information about this matter, including details regarding the procedures to be used by the Commission is posted on the Commission's Web site. Inquiries may also be directed to Commission staff by telephone at (907) 269-4559.

Appendix B

Make Your Comments to the LBC Count!
(One page)

Make Your Comments to the LBC Count!

If you plan to offer remarks during the public comment portion of the Local Boundary Commission hearing concerning the impact of the 2002 City of Homer annexation on KESA, the following tips are offered to make your comments more effective.

1. Come prepared and informed. Carefully plan your comments. Prior to the hearing, you may wish to review the following materials (available at the Homer City Hall and Homer Public Library; also generally available on LBC Web site and through the Department of Commerce, Community, and Economic Development (Department):

A. the Commission's Order of May 18, 2004;

B. comments filed in response to the Commission's Order of May 18, 2004, and its public notice of the remand;


C. the Department's *Preliminary Report on Remand*;


D. comments filed in response to the Department's *Preliminary Report on Remand*; and

E. the Department's *Final Report on Remand*.

2. Provide relevant comments. The LBC's decision on the remand issue will be guided by standards established in law that are applied to the facts of the case.

3. Observe the rules.

 New written materials may not be filed at the hearing unless allowed by the LBC Chairman upon the showing of good cause.

 To ensure that everyone who wishes to speak during the public comment phase of the hearing will have an opportunity to do so, individuals should plan to limit their comments to three minutes each. Different time limits will apply to the Petitioner and Respondents.

4. Avoid repetition. If another speaker has addressed points to your satisfaction, you may wish to simply note that you agree with the earlier remarks, and spend your allotted time on relevant topics that have not yet been addressed.

Appendix C

Law Governing Decisional Procedures
3 AAC 110.570
(One page)

Law Governing Decisional Procedures

3 AAC 110.570. Decisional meeting

(a) Within 90 days after the last commission hearing on a proposed change, the commission will convene a decisional meeting to examine the written briefs, exhibits, comments, and testimony, and to reach a decision regarding the proposed change. The commission will not receive new evidence, testimony, or briefing during the decisional meeting. However, the chair of the commission may ask the department or a person for a point of information or clarification.

(b) Three members of the commission constitute a quorum for the conduct of business at a decisional meeting.

(c) If the commission determines that a proposed change must be altered to meet the standards contained in the Constitution of the State of Alaska, AS 29.04, AS 29.05, AS 29.06, or this chapter, the commission may alter the proposed change and accept the petition AS altered. If the commission determines that a precondition must be satisfied before the proposed change can take effect, the commission will include that precondition in its decision. A motion to alter, impose preconditions upon, or approve a proposed change requires at least three affirmative votes by commission members to constitute approval.

(d) If the commission determines that a proposed change fails to meet the standards contained in the Constitution of the State of Alaska, AS 29.04, AS 29.05, AS 29.06, or this chapter, the commission will reject the proposed change. If a motion to grant a proposed change receives fewer than three affirmative votes by commission members, the proposed change is rejected.

(e) The commission will keep written minutes of a decisional meeting. Each vote taken by the commission will be entered in the minutes. The approved minutes are a public record.

(f) Within 30 days after the date of its decision, the commission will file as a public record a written statement explaining all major considerations leading to the decision. A copy of the statement will be mailed to the petitioner, respondents, and other interested persons requesting a copy. The department shall execute and file an affidavit of mailing as a part of the public record of the proceedings.

(g) Unless reconsideration is requested timely under 3 AAC 110.580 or the commission, on its own motion, orders reconsideration under 3 AAC 110.580, a decision by the commission is final on the day that the written statement of decision is mailed, postage prepaid to the petitioners and the respondents.

History: Eff. 7/31/92, Register 123; am 5/19/2002, Register 162 | Authority: Art. X, sec. 12, AK Const.; AS 29.04.040; AS 29.05.100; AS 29.06.040; AS 29.06.130; AS 29.06.500; AS 44.33.812; AS 44.33.814; AS 44.33.816; AS 44.33.818; AS 44.33.820; AS 44.33.822; AS 44.33.826

Appendix D

Kenai Peninsula Borough
Ordinance No. 2001-48
(Four pages)

Introduced by:	Martin
Date:	12/11/01
Hearing:	01/08/02, 01/22/02
Action:	Postponed until 01/22/02
Date:	01/08/02
Action:	Enacted
Date:	01/22/02
Vote:	5 Yes, 4 No
Action:	Notice of Reconsideration given by Moss for 02/05/02
Action:	No Motion to Reconsider
Date:	02/05/02

**KENAI PENINSULA BOROUGH
ORDINANCE 2001-48**

**AN ORDINANCE AMENDING THE BOUNDARIES OF THE
KACHEMAK EMERGENCY SERVICE AREA TO INCLUDE
PROPERTY LOCATED IN THE MILLER'S LANDING AREA BETWEEN
THE CITY OF HOMER AND KACHEMAK CITY**

WHEREAS, in Ordinance 2000-29 the assembly established the service area now known as the Kachemak Emergency Service Area to provide fire and emergency medical services to the areas described in the ordinance outside of the cities of Homer and Kachemak; and

WHEREAS, the legal description for the proposed service area inadvertently excluded the area known as Miller's Landing which is a wedge of land situated between the City of Homer and the City of Kachemak containing approximately 161.65 acres and 74 residents according to the 2000 census; and

WHEREAS, the existing Kachemak Emergency Service Area contains 139,476.5 acres; and

WHEREAS, the residents of Miller's Landing were among the voters who voted on formation of the service area; and

WHEREAS, election results for Miller's Landing are not available, but Miller's Landing is part of the Fritz Creek precinct, where voters favored forming the Kachemak Emergency Service Area 227 to 66; and

WHEREAS, according to Alaska Statute 29.35.450(c) voter approval is not required to alter the size of a service area where the increase would include less than 1,000 residents and no more than 6 percent of the land area; and

WHEREAS, this increase complies with that requirement; and

WHEREAS, this modification does not violate Alaska Constitution Article X which prohibits the establishment of a new service area if the new service can be provided by annexation to a city as this ordinance is not establishing a new service area but

instead is expanding the size of an existing service area to include an area that was intended to be included in the original service area;

NOW, THEREFORE, BE IT ORDAINED BY THE ASSEMBLY OF THE KENAI PENINSULA BOROUGH:

SECTION 1. KPB 16.20.010 is amended to read as follows:

16.20.010. Boundaries.

There is established a service area within the borough designated as the "Greater Kachemak Volunteer Fire and Emergency Medical Service Area," in that portion of the borough described as all the following referenced to the Seward Meridian, Alaska:

Beginning at the north 1/16 line of section 35, T5S, R15W, and the mean high water line on the westerly shore of Cook Inlet;

Thence Easterly along the 1/16 line to the north 1/16 corner common to section 32 and 33, T5S, R14W;

Thence north along the section line to the intersection of the thread of Anchor River;

Thence easterly along the thread of Anchor River to the point of intersection with the line common to section 36, T4S, R12W and section 31, T4S, R11W;

Thence north to the Northwest corner of T4S, R11W;

Thence east along the township line to the section corner common to section 35 and 36, T3S, R11W, and section 1 and 2, T4S, R11W;

Thence north to the section corner common to section 1, 2, 11, and 12, T3S, R11W;

Thence east to the section corner common to section 5, 6, 7, and 8, T3S, R9W;

Thence south to the section corner common to section 19, 20, 29, and 30, T3S, R9W;

Thence southeasterly on a projected line toward the section corner common to section 28, 29, 32 and 33, T3S, R9W to the thread of the Fox River;

Thence southwesterly along the thread of the Fox River to the Mean High Water Line of the Kachemak Bay;

Thence southwesterly along the Mean High Water Line also being the north shore of Kachemak Bay to intersection of T6S, R12W, and T6S, R13W also being Kachemak City east boundary;

Thence north along the Kachemak City boundary to the south 1/16 corner common to section 1, T6S, R13W, and section 6, T6S, R12W;

Thence west along the Kachemak City boundary to the south 1/16 corner common to section 1, and 2, T6S, R13W;

Thence south along the Kachemak City boundary to the section corner common to section 1, 2, 11, and 12, T6S, R13W;

Thence west along the Kachemak City boundary to the section corner common to section 2, 3, 10, and 11, T6S, R13W;

Thence south along the Kachemak City boundary to the ¼ corner common to section 10 and 11, T6S, R13W;

Thence west along the Kachemak City boundary to the Center ¼ corner of section 10, T6S, R13W;

Thence south along the Kachemak City boundary to the ¼ corner common to section 10 and 15, T6S, R13W also being the north boundary City of Homer;

Thence west along the City of Homer boundary to the section corner common to section 7, 8, 17, and 18; T6S, R13W

Thence south along the City of Homer boundary to the ¼ corner common to section 17 and 18, T6S, R13W;

Thence west along the City of Homer boundary to the ¼ corner common to section 14 and 15, T6S, R14W;

Thence south along the section line to the intersection of the Mean High Water Line of Cook Inlet;

Thence Northwesterly along the Mean High Water Line and the Cook to intersection of the north 1/16 line of section 35, T5S, R15W, the point of beginning.

And that land also known as Miller's Landing more particularly described as:

Beginning at the Mean High Water Line of Kachemak Bay, at the point common to Section 11 and 14, Township 6 South, Range 13 West;

Thence West along the section line also being the Homer City boundary to the centerline of East End Road;

Thence Northeasterly along the centerline of East End Road also being the boundary of Kachemak City to the section line common to Section 11 and 12, Township 6 South, Range 13 West;

Thence South along the section line also the boundary of Kachemak City to the Mean High Water Line of Kachemak Bay;

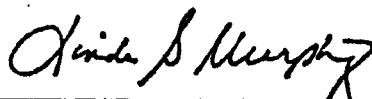
Thence Southwest along the Mean High Water Line of Kachemak Bay, the point of beginning.

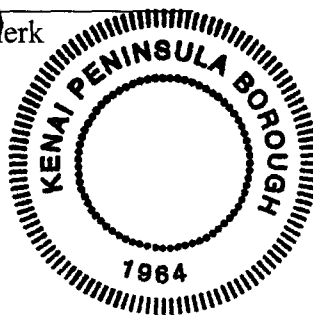
SECTION 2. That this ordinance shall take effect retroactive to January 1, 2002.

ENACTED BY THE ASSEMBLY OF THE KENAI PENINSULA BOROUGH THIS 22ND DAY OF JANUARY, 2002.


Timothy Navarre, Assembly President

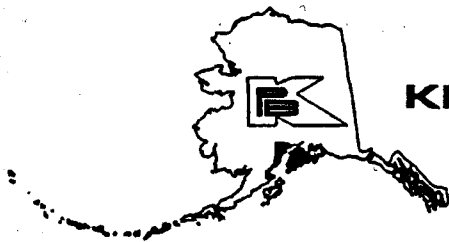
ATTEST:


Linda S. Murphy, Borough Clerk



Appendix E

Report to the Kenai Peninsula Borough
Assembly, May 25, 2000
From Mayor Dale Bagley
(Three pages)



KENAI PENINSULA BOROUGH

144 N. BINKLEY • SOLDOTNA, ALASKA • 99669-7599
BUSINESS (907) 262-4441 FAX (907) 262-1892

DALE BAGLEY
MAYOR

REPORT TO THE ASSEMBLY

RECEIVED

JUN 28 2004

TO: Bill Popp, Assembly President
Members, Kenai Peninsula Borough Assembly

FROM: ~~DLB~~ Dale Bagley, Borough Mayor

Local Boundary Commission

DATE: May 25, 2000

SUBJECT: Greater Kachemak Fire and Emergency Medical Service Area Proposal

On May 1, 2000, the Clerk certified the petition to establish a service area in the Greater Kachemak area on the Southern Peninsula to provide fire and emergency medical services. The Clerk's office has verified that the petition contains more than the required number of valid signatures. (See attached memo from Linda Murphy, Borough Clerk, dated May 1, 2000).

The purpose of this memorandum is to provide information relating to the proposed Greater Kachemak Fire and Emergency Medical Service Area. Pursuant to Kenai Peninsula Borough Code 16.04.010 . 16.04.040, the following is submitted for your consideration.

Proposed Greater Kachemak Fire and Emergency Medical Service Area Boundaries

The proposed service area would encompass the existing 911 Emergency Service Number area on the southern Kenai Peninsula outside of the cities of Homer and Kachemak City. The northern boundary would adjoin the southern edge of the Anchor Point Fire and Emergency Medical Service Area, then extend along the Anchor River with the northernmost boundary adjoining the southern edge of the Central Peninsula Emergency Medical Service (CPEMS) area. See attached map and legal description for details.

Need For Service

The primary reason for establishing this service area is to enhance fire and emergency medical services. Services in this area have been historically provided by the Homer Volunteer Fire Department, now known as the Homer Fire Department since 1991, city of Homer. The creation of the service area would enhance services to the residents within the area by providing additional emergency response resources within the service area and the entire region.

Fire and emergency medical services are needed as apparently no entity is presently formally responsible for this area. The City of Homer Volunteer Fire Department presently

provides services to a portion of this area. Until the voters of the area have approved the exercise of the fire and emergency medical powers, no borough funds can be used to provide these services.

Assessed Value of Area for 1999

The *assessed value* of the proposed service area is \$261,614,500. The total *taxable value* of the proposed service area is \$199,193,000. Using a 1 mill recommendation, as proposed by the petitioners, a maximum of \$199,193 per year could be generated for funding the proposed service area.

Population

There are approximately 10,539 persons residing in the proposed service area.

Next Steps

The administration and assembly must hold at least one public hearing at least 15 days after presentation of this report to further determine the need for the service area and to identify the boundaries. According to KPB 16.04.040:

(1) The assembly shall fix the time and place within the proposed boundaries for a public hearing to consider the necessity for the proposed service area.

(2) The public hearing may be held by a special committee of less than the whole assembly. The special committee must make a report of its findings and recommendations to the whole assembly at a regular meeting prior to the assembly's action on the proposed service area. The president of the assembly appoints the special committee.

(3) As a result of the information received on the petition and during comments at public hearings, the assembly may extend or shorten the boundaries of the proposed service area.

Options for the Assembly to Consider After Public Hearing

Option I. Do not pursue formation of a new service area; maintain status quo.

Option II. Expand the boundaries of existing service areas, i.e. Anchor Point Emergency Service Area and Central Peninsula Emergency Medical Service Area. This would require a vote of the entire new district.

Option III. Create a new service area pending voter approval. The current plan provides for a board which would be elected simultaneously with the vote on the service area ballot proposition. The new board would determine the level of service to be provided and recommend

a budget to the assembly for fiscal year 2001/2002. The assembly may want to consider placing a mill levy restriction on operations, such as proposed by the petitioners. That issue, as well as the boundaries, would be determined during the community meeting and the public hearings on the ordinance.

Option III would follow the general philosophy which has governed the formation of service areas throughout the borough. It allows for maximum local determination of service and maximum flexibility to provide service.

Summary:

The residents of the proposed service area have strongly expressed their desire to establish a fire and emergency medical service area. The citizens' petition to create the service area has been received and certified. There is an active citizens group supporting the service area and working on the details of how to best provide emergency services within the proposed service area. The public hearing process will allow the community to be involved in developing the service area and the voters will have final approval of creating the service area.

